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UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF CALIFORNIA

Chelsea, LLC, Mark Russo, Allen Loretz, and Ivan Simpson, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

Regal Stone, Ltd., Hanjin Shipping, Co., Ltd., Conti Cairo KG, NSB Neiderelbe, Synergy Maritime, Ltd. *In Personam*; M/V Cosco Busan, their engines, tackle, equipment, appurtenances, freights, and cargo *In Rem*,

Defendants.

CASE NO.: C-07-5800-SC

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE WHY A PROTECTIVE ORDER TO SUPERVISE OR OTHERWISE LIMIT COMMUNICATIONS WITH PUTATIVE CLASS MEMBERS SHOULD NOT ISSUE

Ctrm: 1, 17th Floor
Hon. Samuel J. Conti

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I. INTRODUCTION

Plaintiffs in the instant action, *Chelsea, LLC, et al. v. Regal Stone, Ltd, et al.* ("*Chelsea*") with the support of the plaintiffs in the related class action filed in state court, *Tarantino, et al. v. Hanjin Shipping Co., Ltd.*, San Francisco County Superior Court Case No. CGC-07-469379 ("*Tarantino*"), bring this Motion for an Order to Show Cause ("Motion"), respectfully seeking the Court's assistance in preserving the integrity of the class action process and rights of the putative class members of both actions (together "Putative Class Members"). *See* Declaration of William M. Audet in Support of Plaintiffs' Motion for an Order to Show Cause ("Audet Dec."), Declaration of Frank Pitre in Support of Plaintiffs' Motion for an Order to Show Cause ("Pitre Dec."), ¶¶ 2-4, Ex. A (*Tarantino* Complaint).

Defendants and their apparent agent, Hudson Marine, without giving notice to any counsel for Class Plaintiffs, have initiated a claims process ("Claims Process") which is rife with pretrial misrepresentations, misleading omissions, and coercion aimed at dissuading Putative Class Members from participating in either class action and otherwise interfering with the relationship between the lead plaintiffs in both actions (together "Lead Plaintiffs") and their counsel. "[Federal] Rule [of Civil Procedure] 23 expresses a policy in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single lawsuit." *Gulf Oil v. Bernard*, 452 U.S. 89, 99 n. 11 (1981) (internal quotations omitted). Defendants appear intent on using the Claims Process to frustrate this important policy and thereby avoid their full responsibility for the injuries suffered by Putative Class Members.

Plaintiffs respectfully request that the Court exercise its authority under Rule 23 to prevent this from occurring by issuing an order that requires Defendants and their agents to conduct the Claims Process in a manner which neither misleads Putative Class Members, coerces their decision regarding what remedies to pursue, nor

interferes with attorney-client relationships. *See id.* at 104. Class Plaintiffs are not requesting that Defendants cease the Claims Process, rather only that they conduct it in a manner which is transparent, fair, and does not prejudice the rights of Putative Class Members or the policies furthered by the class action mechanism.

II. BACKGROUND

A. The Class Actions

On November 7, 2007, the Cosco Busan ("Ship") collided with the Delta Tower of the Bay Bridge tearing a 100-foot long gash in its side, from which 58,000 gallons of highly toxic bunker fuel poured into the Bay ("Oil Spill"). *See Chelsea* Complaint ¶ 20, *Tarantino* Complaint, ¶ 1. Defendants waited approximately one hour before calling spill-containment operators, allowing the spilled fuel to spread unabated across the waters of the Bay. *See Chelsea* Complaint ¶ 21, *Tarantino* Complaint ¶ 5.

The damage caused to the ecology of the Bay was exacerbated, and continues to be exacerbated, by the nature of the oil which was spilled. Bunker fuel is both highly toxic and heavy. *See Tarantino* Complaint, ¶¶ 41-50. When spilled, bunker fuel sinks much faster than lighter crude oil. *Tarantino* Complaint, ¶ 50. This not only causes large quantities of spilled bunker fuel to quickly sink to the ocean floor and coat anything upon it, it also prevents water soluble toxins in the fuel from evaporating into the air prior to sinking with those toxins intact. *Tarantino* Complaint, ¶ 50. Thus, while a massive clean-up of the Oil Spill was eventually initiated by federal, state, and local authorities at a cost of millions of taxpayer dollars, the eventual beach openings and apparent lack of bunker fuel on the surface of the Bay paint a deceptive picture of the cleanup's success. Large amounts of the Oil Spill almost certainly made its way to the bottom of the Bay and will likely effect its ecology, and particularly the reproductive health of the marine life which inhabit it, for many years to come. *Tarantino* Complaint, ¶¶ 44-52, 65-77. *See also Chelsea* Complaint.

The Oil Spill promises to have both immediate and long-term negative effects upon the livelihoods of the commercial fishermen who depend on the Bay and constitute the Putative Class. In the short-term, the Oil Spill caused a *de facto* closure of the Dungeness crab fishing season for approximately its first two weeks ("Closure"), a period during which crab fishermen not only traditionally pull in up to 80% of the season's catch, but also get premium prices because of the Thanksgiving holiday. *Tarantino*, ¶¶ 62-64. Other fisheries, such as the rockfish fishery and the herring fishery were also *de facto* closed following the Oil Spill. The long-term effects on fishermen's livelihoods could be far more profound as the effects of the Oil Spill are felt, particularly on the reproductive cycles of the Dungeness crabs, herring, and other fish which use the Bay as a nursery. *Id.*, ¶¶ 47, 50, 66-77.

On November 11, 2007, the instant *Chelsea* action was filed in this Court on behalf of a class defined as:

> all commercial fishing operations, crab, shellfish, bottom fish, herring fishing, and recreational charter vessel operations, which commercially fish and/or operate in and around the coastal waters of the San Francisco Bay Area and adjacent fishing areas grounds.

Verified First Amended Complaint ("F.A.C."), ¶ 25. On November 20, 2007, the *Tarantino* action was filed in the Superior Court of San Francisco on behalf of a class defined as:

> all commercial fishing operations, including crab, herring, flat fish, salmon and other fish, which commercially fish in and around the San Francisco Bay and surrounding ocean areas.

Tarantino Complaint, ¶ 20. With some slight differences, both complaints essentially name the same defendants ("Defendants").

Both actions seek *inter alia* that compensation be paid to Putative Class Members for both their short-term and long-term economic injuries caused by the Oil Spill, as well as punitive damages. *See Chelsea* at pp. 11-12; *Tarantino* Complaint at p. 33. The *Chelsea* Complaint further prays for a Court-supervised clean-up program be established. *Chelsea* at p. 11. The *Tarantino* Complaint prays for Defendants'

establishment of a monitoring trust fund to monitor and ensure the safety and fitness for human consumption of seafood caught in the San Francisco Bay Area. *Tarantino* Complaint at p. 33.

B. The So-Called Claims Process

Subsequent to the filing of the complaints, an entity known as Hudson Marine (apparently a "claims adjuster" working on behalf of one or more Defendants), initiated a claims process purportedly to "pay" some Putative Class Members, specifically Dungeness crab fishermen,[1] interim "advances."[2] *See* Fitz Dec., ¶ 3; *Tarantino* Dec., ¶ 3. Declaration of William Audet in Support of Plaintiffs' Motion for Order to Show Cause ("Audet Dec."), ¶ 3.

Neither Hudson Marine nor any Defendant (or representative thereof) provided any advance information to Plaintiffs' counsel regarding the establishment of the Claims Process. Pitre Dec., ¶ 7, Audet Dec., ¶ 3.. Rather, Plaintiffs' counsel learned that the Claims Process had been established through communications with their respective lead plaintiffs and class members. Pitre Dec., ¶ 8. Investigations have subsequently revealed that the Hudson Marine and/or other agents of Defendants have, in their conduct of the Claims Process, made significant, material misrepresentations to Putative Class Members, failed to disclose critical information to Putative Class Members, and sought to financially "punish" those Putative Class Members who have sought assistance of counsel to pursue remedies through the courts, with the apparent

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[1] Apparently other types of commercial fishermen were not included at this point.

[2] Under the Oil Pollution Act ("OPA"), 33 U.S.C. 2701 *et seq.*, a party responsible for an oil spill is obligated to set up a "claims process." However, the claims process is not a "free for all" that allows a defendant faced with a class action lawsuit to "gut" the class action proceedings. Indeed, the OPA class process claims process is a voluntary one for injured victims, not a process designed to gain information from injured victims and deny them Court access. The problem here is that the claims process is without any Court oversight and as a result, has been misused.

intent of dissuading similar choices by others, and interfering with those Class Members' relationships with counsel.

During a face-to-face meeting in December 2007, two critical representations were made by representatives of Defendant(s) regarding the claims process to induce participation by Putative Class Members which now appear to have been false or at least misleading. First, Defendant(s) verbally represented that participation in the Claims Process would in no way prejudice a Putative Class Member's rights to bring suit, in any forum, using any process, for damages other than interim damages flowing from the Closure. Audet Dec., ¶ 3. Second, Defendant(s) represented that there would be no cap to the damages which Putative Class Members would be entitled to receive in the claims process. *Id.*.

This appears not to be true. An interim damages claim form distributed by Hudson Marine to a Putative Class Member ("Claim Form") contradicts these representations.

Indeed, the Claim Form contains broad ambiguous language that purports to bind signatories to an undefined "process" for the resolution of a large swath of claims. Pitre Dec., ¶¶ 5-6, Ex. B. It states directly above the signature line:

> I hereby agree to use this process to resolve my past and present claims only as it relates to my claimed past and present lost revenue due to the oil spill of November 7, 2007. I also acknowledge this prepayment will be credited against any further amounts, if any.

Id., Ex. B. Without definition (which as discussed is misleading in and of itself) there is no way to tell exactly what "this process" consists of. However, indications suggest that the Claims Process is to be conducted pursuant to the Oil Pollution Act of 1990 ("OPA 90"), 33 U.S.C. § 2701 *et seq.*, in which case a signatory would then be legally required to ***exhaust the process*** before he or she could "commence an action in court."

33 U.S.C. § 2713(b).[3] Furthermore, the OPA 90 would also place a ***qualified cap on the responsible party's liability***, which no Defendant has so far indicated they would waive. 33 U.S.C. § 2704.

A cover letter is distributed with the Claim Form ("Cover Letter"). Pitre Dec., ¶¶ 5-6, Ex. B. However, it does nothing to dispel the ambiguity as the "process" to which the Claim Form purports to bind Putative Class Member signatories. In fact, it states that Putative Class Member signatories **must provide Hudson Marine with a laundry list of detailed information** before Hudson Marine will give signatories any information at the places they have agreed to use:

> Upon receipt of your fully executed Claims Confirmation Form and relevant documents, we will contact you to advise you of the next step in our claim process.

Id. It is not only regarding the Claims Process, that Claim Form and Cover Letter fail to provide any information. They also contain no information regarding putative class members' rights to retain counsel, the existence of class actions which have been filed on their behalf, the identity of class counsel, or any other information which would assist a Putative Class Member decide whether to participate in the Claims Process or pursue other remedies. *See id.*

In addition to these stark informational shortcomings, Defendants and their agents have also used the Claims Process as means to punish the Lead Plaintiffs, apparently in order to both dissuade other Putative Class Members from making similar choices, and persuade those Putative Class members to terminate such representation and pursuits. On or about December 8, 2007, Harry Bolton, a claims adjuster working for Hudson Marine informed John Tarantino, lead plaintiff in the *Tarantino*, that Mr. Tarantino could only participate in the Claims Process if he terminated his

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[3] In some ways, this exhaustion requirement could be a best case scenario. It is possible that by agreeing "to use this process" that a signatory is giving up all rights to bring an action in court. Without definition, there is no way to know.

representation by counsel. Tarantino Dec., ¶ 7. Similarly, on December 13, 2007 a Putative Class Member, Michael McHenry, was informed by the same Mr. Bolton, that because Steven Fitz, the other lead plaintiff in the state court action, was a plaintiff in a court action against Regal Stone Ltd. and others responsible for the Oil Spill, Mr. Fitz could not participate in the Claims Process. Fitz Dec., ¶ 7. The local fishing community that makes up the Putative Class is close-knit and information travels fast through it. Fitz. Dec., ¶ 8. Knowledge of the exclusion of Mr. Tarantino and Mr. Fitz from the Claims Process because of their participation in the *Tarantino* action is now well known among Putative Class Members, and have apparently influenced Putative Class Members to abandon their previous intention of joining the action. Fitz Dec, ¶¶ 9-10. Seeing their fellows get promises of payments and sometimes advances has also shaken their confidence in counsel and interfered with that relationship. Fitz. Dec., ¶ 11.

Similarly, on December 14, counsel for Defendant Regal Stone Ltd. *et al.*, at the end of a meeting, informed counsel for plaintiffs in the *Chelsea* action that his clients were also "prohibited" from participating in the Claims Process. Audet Dec., ¶ 4. Counsel for Defendants subsequently essentially stated that because the undersigned filed a class action and filed a motion for a bond, this firm's clients would not be "paid" any advances. The attorney further noted that counsel for plaintiffs in the instant action would soon not have any clients at all, all but admitting that Defendants were excluding certain Plaintiffs and class members from the Claims Process in order to defeat both class action litigations, to say nothing of admitting Defendants' intent to interfere with the relationship between the plaintiffs in the instant action and their counsel. *Id.*

Thus, Defendants and their agents have not only distributed false, misleading, and woefully incomplete information to Putative Class Members as part of the Claims Process, they have also conducted the Claims Process so as to coerce Putative Class Members into abandoning class action litigation against Defendants and interfere with

their relationships with their counsel. By doing so, Defendants seek to avoid Court supervision over the process by which Bay Area fishermen are compensated for their economic injuries flowing from the Oil Spill and limit Defendants' liability by frustrating the instant action and *Tarantino*. Plaintiffs respectfully request that the Court prevent this happening by using its authority to ensure that all Putative Class Members receive complete and accurate information and are allowed to participate in a claims process which does not prejudice their rights.

III. LEGAL STANDARD

In *Gulf Oil v. Bernard*, the Supreme Court recognized that the authority a district court to supervise and limit communications in class actions extends to communications with putative class members made before the class has been certified. 452 U.S. 89; *see also, e.g.*, *In re Currency Conversion Fee Antitrust Litigation*, 361 F.Supp.2d 237, 252 (S.D.N.Y. 2005) (collecting cases). This recognition was based on the Court's finding that while "[c]lass actions serve an important function in our system of civil justice[,] [t]hey present opportunities for abuse" which extend into the period preceding a decision on certification. *Gulf Oil*, 452 U.S. at 99.

> Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties."

Id. (emphasis added).

The Court further made clear that a district court need not wait for evidence of actual abuse, but rather should act upon a finding of *"**a likelihood** of serious abuse."* *Id.* at 104 (emphasis added); *see also, e.g., In re Sch. Asbestos Litig.*, 842 F.2d 671, 683 (3d Cir. 1988) ("Rule 23(d) does not, however, require a finding of *actual* harm; it authorizes the imposition of a restricting order to guard against the *'likelihood* of serious abuses.'") (quoting *Gulf Oil*, 452 U.S. at 104; emphasis in original). Thus, as one of the leading cases on the subject put it, "[t]hat the interests embodied in Rule 23 might be hindered is a sufficient finding upon which to base an order limiting

contacts." *Hampton Hardware v. Cotter & Company, Inc.*, 156 F.R.D. 630, 633 (N.D. Tex. 1994); *see, e.g., Veliz v. Cintas Corp.*, No. 03-2280, 2004 WL 2623909, *3 (N.D. Cal. Nov. 12, 2004) (following *Hampton Hardware*). "Rule 23 expresses 'a policy in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single lawsuit." *Gulf Oil*, 452 U.S. at 99 n. 11. Thus, any communication which creates a likelihood of seriously threatening this policy triggers the court's authority and duty to limit such communication.

The Court in *Gulf* did, however, caution courts to be cognizant of any first amendment concerns implicated by the circumstances of any limitation of communications. It stated:

> "[A]n order limiting communications between should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.
> . . .
> In addition, such weighing-identifying the potential abuses being addressed, should result in a carefully drawn order that limits speech as little as possible, consistent with the rights under the circumstances.

Id. at 101-02 (emphasis added).

While some courts have apparently read this language unconditionally and applied the requirements therein without analyzing whether the *circumstances* of the communication at issue justify the requirements' application, *see, e.g., Eshelman v. Orthoclear Holdings, Inc.*, No. 07-01428, 2007 WL 2572349, *2 (N.D.Cal. Sep. 4, 2007), a better reasoned approach adopted by several courts examines whether the type of speech in question demands such stringency. These courts have recognized that the Supreme Court's decision in *Gulf Oil*, and the stringent standard articulated therein, was animated with first amendment concerns which do not apply with the same force where the communications in question are "grounded in the 'economic interests of the speaker and the audience,'" and thus qualify as commercial. *Hampton Hardware*, 156 F.R.D. at 633 (quoting *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1203 n. 22 (11th Cir. 1985)); *see also In re Currency Conversion Fee Antitrust Litig.*, 361

F.Supp.2d at 254. The 11th Circuit, in *Kleiner*, discussed the issue at length. It distinguished communications at issue before it between the defendant bank and absent borrower class members intended to persuade them to opt-out of the class action, and the communications at issue in *Gulf Oil*, which were conducted by the NAACP Legal Defense and Education Fund and local counsel with putative class members to encourage their participation in a suit regarding racial discrimination. *Kleiner*, 751 F.2d at 1203-06. It noted that because the latter communication involved "protected, non-commercial political expression," restrictions upon it "called 'into play the full panoply of First Amendment safeguards against prior restraint.'" *Id.* at 1205 (quoting *Gulf Oil v. Bernard*, 604 F.2d 449, 473 (5th Cir. 1979) *affirmed* 452 U.S. 89.). Prior restraint of this type of speech demanded the heighten scrutiny described by the Supreme Court in *Gulf Oil*, specifically the requirements that such an order be narrowly tailored and "'based on a clear record and specific findings that reflect a weighing of the need for a limitation with the potential interference with the rights of the parties.'" *Id.* (quoting *Gulf Oil*, 452 U.S. at 101). Orders restricting commercial speech, such as the solicitation to settle the purely economic dispute at issues in *Kleiner*, on the other hand, demanded only that the order be "grounded in good cause and issued with a 'heightened sensitivity' for first amendment concerns." *Id.; see also Hampton Hardware*, 156 F.R.D. at 633; *In re Currency Conversion Fee Antitrust Litig.*, 361 F.Supp.2d at 253-54 (rejecting the argument that it "may not restrict [the defendants'] communications with potential class members absent specific findings of abuse by defendants").

The communications at issue here between Defendants and their agents and Putative Class Members are purely commercial in character: they are aimed at lessening Defendants' litigation risk by reducing the number of Putative Class Members and frustrating, overall, Class Plaintiffs efforts to hold them liable in court for all the damages for which they are responsible. *See Kleiner*, 751 F.2d at 1203 n. 22. Thus,

while the evidence of actual and potential abuses by Defendants and their agents is more than sufficient under the *Gulf Oil* standard to support a detailed order justifying the remedies which Class Plaintiffs seek, this standard need not be met for the Court to take the action requested.[4]

Finally, it should be kept in mind that, "as a threshold matter" communications by Defendants and their agents which is "untruthful or misleading" is "speech [that] has no claim to first amendment immunity." *Kleiner,* 751 F.2d at 1204. Much of the communications at issue is both.

IV. ARGUMENT

The communications made by Defendants and their agents to Putative Class Members have been false, misleading, coercive, and interfered with class counsels' representation of their clients. These communications create a likelihood of serious harm if the Court does not take the preventative and curative actions which Plaintiffs propose. These curative actions do not overly interfere with the rights of the Defendants in the circumstances, considering the nature of the communications in question, Defendants' legitimate interests in the Claims Process, and the threat which the communications pose the class action process.

A. The Communications To Putative Class Members By Defendants And Their Agents Are Abusive And Demand Court Intervention

Courts have, generally, found two broad categories of communication with putative class members create a likelihood for abuse and thus demand court intervention: communications which are false, misleading, or confusing to putative class members, *see, e.g. In re McKesson HBOC, Inc. Securities Litig.*, 126 F.Supp.2d 1239,1245 (N.D. Cal. 2000); *In re Sch. Asbestos Litig.*, 842 F.2d at 683; *Burford v. Cargill, Inc.*, No. 05-0283, 2007 WL 81667, *2 (W.D. La. Jan. 9, 2007); *Ralph*

[4] The *Kleiner* court also held that "it is unnecessary for a trial court to issue particularized findings of abusive conduct when a given form of speech is inherently conducive to overreaching and duress." 751 F.2d at 1206. Significant amounts of the communication by Defendants or their agents at issue so qualifies.

Oldsmobile, Inc. v. General Motors Corp., No. 99-4567, 2001 WL 1035132, *2-3 (S.D.N.Y. Sept. 7, 2001); *Jenifer v. Del. Solid Waste Auth.*, Nos. 98-270/98-565, 1999 WL 117762, at *7 (D. Del. Feb. 25, 1999); and communication that coerces putative class members' choices regarding remedies or undermine their cooperation with or confidence in class counsel, *see, e.g., Veliz*, 2004 WL 2623909, *3; *Kleiner*, 751 F.2d at 1202-03; *In re Currency Conversion Fee Antitrust Litigation*, 361 F.Supp.2d at 254; *Hampton Hardware*, 156 F.R.D. 632-34. While the communications to Putative Class Members by Defendants and their agents need only fit one of these descriptions to demand the Court's intervention, all of these descriptions apply.

1. Communications to Putative Class Members by Defendants Are Misleading and Confusing, At Best

The communications to Putative Class Members by Defendants and their agents qualify as false, misleading, and, at the very least, confusing and so demand the Court's intervention.

It is well established that, "[o]ne policy of Rule 23 is the protection of class members from 'misleading communications from parties or their counsel.'" *In re Currency Conversion Fee Antitrust Litigation*, 361 F.Supp.2d at 252 (quoting *Erhardt v. Prudential Group, Inc.*, 629 F.2d 843, 846 (2d Cir. 1980)). The Second Circuit explained:

> Unapproved notices to class members which are ***factually or legally incomplete, lack objectivity and neutrality, or contain untruths*** will surely ***result in confusion and adversely affect the administration of justice.***

Erhardt, 629 F.2d at 846; *see also In re Sch. Asbestos Litig.*, 482 F.2d at 683 (affirming district court conclusion quoting *Erhardt*, 629 F.2d at 846). The applicability of this reasoning to the communications to Putative Class Members by the Defendants and their agents is clear.

Most obvious are the misrepresentations which have been made by Defendants regarding the consequences of participating in the Claims Process. Defendants represented that participation in the Claims Process would in no way prejudice a

Putative Class Member's rights to bring a suit in any forum, using any process, for damages other than interim damages which flow from the Closure. Audet Dec., ¶ 3. However, the Claim Form which must be signed by Putative Class Members in order to receive those damages obliges the signatory to use an undefined "process," exclusively, "to resolve . . . past and present claims . . . [that] relate[] to . . . past and present lost revenue due to the oil spill of November 7, 2007." Pitre Dec., Ex. B. Regardless what the process turns out to be, the fact that Putative Class Members who sign the Claim Form are bound to the process conflicts with the representation that Putative Class Members would be free to use whatever process they choose in order to seek compensation for injuries other than those which flow directly from the Closure. Indeed, indications suggest that the Claims Process is to be conducted pursuant to the OPA 90, in which case a signatory would be legally required to ***exhaust the process*** before he or she could "commence an action in court." 33 U.S.C. § 2713(b). Furthermore, if these indications are correct (again there is no way to know because neither Claim Form, Defendants, or their agents have defined the Claims Process for Putative Class Members), another representation made to Putative Class Members by Defendants or their agents is false: that there would be no cap to Defendants' liability for Putative Class Members' injuries. Audet Dec., ¶ 3. The OPA 90 places a qualified cap on a responsible party's liability, *see* 33 U.S.C. § 2704, which Defendants have not indicated they are willing to waive.

As the foregoing discussion suggests, however, equally misleading and damaging to fair and efficient resolution of Putative Class Members' claims against Defendants which arise out of the Oil Spill are the ***omissions from the Claim Form***. There is no question that the "same policy concern" which justify court intervention to prevent or cure overtly false communications to putative class members "applies where a party misleads class members by ***omitting*** critical information from its communications." *In re Currency Conversion Fee Antitrust Litig.*, 361 F.Supp.2d at 252 (emphasis added). As one court put it, "[w]hile [a] defendant may seek to settle

individual claims prior to certification, the putative class members should know what the essence of the claim they would be giving up" *Jenifer*, 1999 WL 11762, at *7; *Puerto Rico v. M/V Emily S. (In re Metlife Capital Corp.)*, 132 F.3d 818, 824 (1st Cir. 1997) ("If the responsible party denies liability or the claim is not settled within 90 days, the claimant may proceed against the responsible party in court or present the claim to the Fund"); *see also Ralph Oldsmobile*, 2001 WL 1035132, at *4 (finding that defendants' failure to provide sufficient information in the context of release distributed to putative plaintiffs created "a risk that [putative class members] may sign the release without knowing what they are releasing. Such an unknowing release would be abusive and warrant relief."). These observations apply with force to Defendants' omissions in the Claims Process.

The Claim Form's most obvious abusive omission is that it purports to bind Putative Class Members to use a process about which neither the Claim Form nor its accompanying cover-letter provide any information. *See* Pitre Dec., Ex. B. Indeed, the cover letter conditions provision of such information to Putative Class Members signatories on such members first providing Defendants' agent with reams of detailed information. *Id.* Binding Putative Class Members to a process which could prejudice their rights to proceed as part of a class, without giving any information as to the nature of that process not only runs afoul of the interests further by Rule 23, but also basis notions of fair play. What's more, demanding that Putative Class Member signatories first submit to comprehensive unilateral discovery subverts the Court's authority to regulate discovery in the class context and particularly so as to protect absent class members. *See, e.g., On the House Syndication, Inc. v. Federal Express Corp.*, 203 F.R.D. 452, 455-56 (S.D. Cal. 2001) (wide-ranging discovery from absent class members undermines the very purpose of class action suits); *Collins v. Int'l Dairy Queen*, 190 F.R.D. 629, 630-31 (M.D. Ga. 1999) ("absent class action plaintiff is not required to do anything") quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 n. 2 (1985); *Redmond v. Moody's Investor Serv.*, No. 92 Civ. 9161 (WK), 1995 WL

276159, * 1 (S.D.N.Y May 10, 1995) (discovery of absent class members regarding individual issues is inappropriate).

The informational deficiencies of the Claim Form and Cover Letter are not, however, isolated omissions regarding the process to which they purport to bind Putative Class Members. Rather, the Claim Form and Cover Letter are also misleading in their omission of any information about the instant action, the *Tarantino* action, or how to contact either class counsel. Addressing a similar claims form and release, a district court recently held:

> [t]he use of the general receipt and release . . . ***without notification of the pending class action is misleading as a matter of law.*** The court further finds that such misleading communications are abusive and threaten the proper functioning of the instant litigation.

Burford, 2007 WL 81667, at *2 (emphasis added). The court in *Jenifer* reached the same conclusion:

> Some potential plaintiffs may wish to participate in the action and, therefore, should be given the necessary information and opportunity to choose . . . Before any [putative class member] signs the release . . ., [defendant] must give [the putative class members] adequate notice of the pendency of this action and that by signing the release they forego their rights to this litigation.

1999 WL 117762, at *7; *see also Ralph Oldsmobile*, 2001 WL 1035132, at *5 (finding that the release should have included with it detailed information regarding the pending class action, including contact information of the putative class attorneys, and how signing the release would affect their ability to participate as a class member).

Finally, the communications which have come from Hudson Marine are misleading by virtue of Defendants' and Hudson Marine's refusal to specifically clarify their relationship with one another. *See* Audet Dec, ¶ 5. In *In re School Asbestos Litig.*, the Third Circuit recognized that communications to putative class members which fail to identify their true authorship can be misleading. 842 F.2d at 683. In the particular case before it, the Third Circuit affirmed the district court's finding that by failing to identify the relationship between the defendants and the publisher of an informational booklet sent to putative class members urging them to take certain

actions which would have reduced defendants' liability in the class action, the booklet was "misleading as to its objectivity and neutrality." 842 F.2d 671 (quoting lower court opinion); *see also generally Hampton Hardware*, 156 F.R.D. at 634 (discussing court's duty to "protect[] potential class members from making decisions based on one-sided information from an interested party"). Here, as well, by not informing Putative Class Members what Hudson Marine's relationship is with the Defendants, Putative Class Members are unable to accurately evaluate information given to them by Hudson Marine including any offers of settlement by them[5].

2. The Communications To Putative Class Members By Defendants And Their Agents Are Coercive

The communications to Putative Class Members are also coercive and thus require the Court's intervention. The Third Circuit has recognized as "blatant misconduct" demanding court intervention communication with putative class members which seeks "either to affect class members' decisions to participate in the litigation or to undermine class plaintiffs' cooperation with or confidence in counsel." *In re Sch. Asbestos Litig.*, 482 F.2d at 682; *see also Veliz*, 2004 WL 2623909, *3; *In re Currency Conversion Fee Antitrust Litigation*, 361 F.Supp.2d at 252-53; and, *Hampton Hardware*, 156 F.R.D. 632-34. By refusing to allow the lead plaintiffs to participate in the Claims Process, regardless whether they were willing to sign the release demanded by Defendants and their agents, and communicating that prohibition to other Putative Class Members, Defendants have sent a powerful message to the Putative Class as a whole that if they seek the assistance of counsel and participate in either class action

[5] It should be noted, the fact that some of the communications in question did not directly address the class actions filed in this Court or state court does inoculate those communications from the Court's authority to protect from threats "the integrity of the class and the administration of justice generally." *In re Sch. Asbestos Litig.*, 842 F.2d at 683. The district court in *In re Sch. Asbestos Litig.* rejected the defendant asbestos manufacturers' argument that communications which encouraged school administrators not to remove asbestos but did not mention pending class actions escaped the court's supervisory authority under Rule 23. *Id.* at 682. The Third Circuit affirmed: "Such communications are not, in fact, litigation-neutral; as the district court concluded they seek to protect defendants' pecuniary interests by influencing decisions which will determine defendants' ultimate liability in the litigation." *Id.* at 682-83.

they would be denied money which others are receiving, in the same manner, have undermined the lead plaintiffs' relationship with their respective counsel.

One of the lead plaintiffs in the *Tarantino* action, John Tarantino, was told by a Hudson Marine representative that Mr. Tarantino could not participate in the claims process unless he terminated his representation by counsel (and thus logically his role as lead plaintiff in the action). Tarantino Dec., ¶ 7. Similarly, Michael McHenry, a Putative Class Member, was told by the same representative of Hudson Marine that because Steven Fitz, the other lead plaintiff in the *Tarantino* action, was named plaintiff in an action against Regal Stone Ltd. *et al.*, Mr. Fitz could not participate the Claims Process. Fitz Dec., ¶ 7. The latter statement was made to Mr. McHenry at the same time that Mr. McHenry signed the Claim Form to participate in the Claims Process and received an advance payment. *Id.* Thus, the message to Mr. Henry, Mr. Fitz, Mr. Tarantino, and other Putative Class Members was clear: if you get an attorney and participate in a class action you get nothing, but if you don't, you get paid. *See* Fitz Dec., ¶¶ 8-10.

In *Hampton Hardware*, the court found similar communications from the defendant to putative class members which warned of the economic costs of participating in the litigation were obviously intended to influence the members' decisions whether to participate:

> Regardless of the stated purpose of the letters . . . any common sense reading of them reveals they are an attempt to prevent member participation in the class action.

156 F.R.D. at 632. Here too, Defendants are "attempting to reduce the class members participation" in the lawsuit based on threats to their pocketbooks. *Id.* at 633. The fact that the mechanism slightly differs, denying those who participate a benefit offered to others, is immaterial.

Indeed, Defendants have all but admitted that it is their intent to use inequitable treatment of lead plaintiffs in the Claims Process, and communication thereof to Putative Class Members, to not only dissuade other Putative Class Members from

joining the class actions, but also to disrupt the relationships between Lead Plaintiffs and their respective counsel. In a meeting between counsel for Regal Stone Ltd. *et al.* and counsel for plaintiffs in the instant action, counsel for Regal Stone Ltd. *et al.* went so far as to say, after rejecting counsel's request that his clients be allowed to fairly participate in the Claims Process: that soon you will not have any clients "at all." Audet Dec., ¶ 4. It is without question that this conduct runs directly against the policies embodied in Rule 23 and recognized by the Court in *Gulf Oil*, 452 U.S. at 99, n. 11.

C. Unless And Until The Court Exercises Its Broad Authority To Remedy And Prevent Defendants' Abusive Communication Serious Abuse Will Result

The Court need only find that the communications to Putative Class Members by Defendants and their agents present the "likelihood of serious abuses" to trigger its "duty and broad authority to exercise control over a class action and enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil*, 452 U.S. at 104, 101; *see also In re School Asbestos Litigation*, 842 F.2d at 671; *Hampton Hardware*, 156 F.R.D. at 633. Nonetheless, there is already evidence of actual harm caused by these communications and associated conduct. Thus, Plaintiffs respectfully request that the Court perform this duty and exercise this broad authority in the manner requested below.

1. Abuses Flowing From Misrepresentations And Omissions In The Claims Process And Prevention And Remedy Thereof

Defendants and their agents have induced, and seek to continue inducing, Putative Claims Members to participate in the Claims Process by misrepresenting to them the consequences of their participation, omitting any description on the Claim Form or Cover Letter of the consequences or operation of the Claims Process, and omitting any information on the Claim Form or Cover Letter regarding either class action. This is in addition to the coercive conduct and communications discussed

below also aimed at inducing Putative Class Members to choose participation in the Claims Process over litigation.

Many courts have recognized that communications regarding a release of claims in the context of a class action which do not full describe the consequences of the release result in "potentially unknowing waivers of rights" by putative class members. *Ralph Oldsmobile*, 2001 WL 1035132, at *3; *see also, e.g. Jenifer*, 1999 WL 117762, at *7. That danger is exponentially heightened here, where Defendants and their agents have not simply omitted information regarding either class action or how participation in the Claims Process would impact a Putative Class Members ability to participate in either action. Rather, Defendants have also failed to inform Putative Class Members regarding the nature the Claims Process they are binding themselves to use, while affirmatively misleading Putative Class Members as to the consequences of that process. Thus, the conduct of Defendants and their agents have created the strong likelihood that Putative Class Members will not only unknowingly waive their rights to participate in either class action but also rights that they may have had independent of the class actions which are affected by their participation in the Claims Process.

However, while "[t]he damage from [Defendants' and their agents'] misstatements could well be irreparable," it can be mitigated. *Kleiner*, 751 F.2d at 1203. As Judge Whyte found necessary in *McKesson*, Class Plaintiffs respectfully submit that the Court could take actions "(1) to remedy any misleading statements that have already been made; and (2) to prevent any repetition of the conduct." 126 F.Supp.2d at 1246. These actions are:

1. Immediately enjoin the Claims Process and associated communications by Defendant or their agents, until a Revised Claim Form and Revised Cover Letter, as described below, is drafted and approved by the Court. *See, e.g., Hampton Hardware*, 156 F.R.D. at 634.

2. Order Defendants, in cooperation with Plaintiffs and subject to Court approval, to redraft, and submit for Court approval, a Revised Claim Form and Revised Cover Letter, which Defendants and their agents will be required to exclusively use on communication with Putative Class Members, that includes:

(a) The following proposed language above the signature line on the Revised Claim Form which aligns the actual consequences of participation in the Claims Process with the descriptions thereof that have been provided to Putative Class Members: "Acceptance of any payment is without prejudice to pursuit of any legal action in a court of law. Any payment through the Claims Process will be credited against any recovery by compromise, trial or other adjudication of past, present or future claims arising out of the incident of November 7, 2007." *See, generally, Currency Conversion Fee Antitrust Litigation*, 361 F.Supp.2d at 257.

(b) A complete description of the Claims Process, including the identity of Hudson Marine and its employer, without conditions. *See, e.g. In re Sch. Asbestos Litig.*, 842 F.2d at 684.

© Complete information regarding both class actions, including status of actions and contact information of counsel for plaintiffs in both class actions. *See, e.g., Ralph Oldsmobile*, 2001 WL 1035132, at *5; *Jenifer*, 1999 WL 117762, at *7.

3. Order Defendants to distribute, in cooperation with Plaintiffs and subject to Court approval, a Curative Notice with the Revised Claim Form and Revised Cover Letter to every Putative Class Member who has already signed any claim form with Defendants, Hudson Marine or *any* other agent of the defendant, *see, e.g., Ralph Oldsmobile*, 2001 WL 1035132, at *5; *Jenifer*, 1999 WL 117762, at *7, which informs such members of their right to rescind their former agreement with Defendants, Hudson Marine, or any other agent of the Defendants and enter, if they choose, the agreement embodied in the Revised Claim Form. *See, e.g. McKesson*, 126 F.Supp.2d at 1246; *Currency Conversion Fee Antitrust Litigation*, 361 F.Supp.2d at 257; *Ralph Oldsmobile*, 2001 WL 1035132, at *7; *Wang v. Chinese Daily News*, 236 F.R.D. 485, 489 (C.D. Cal. 2006).[6]

If these actions are not taken, the overt misrepresentations and omissions which Defendants and their agents have made regarding the Claims Process will almost certainly lead Putative Class Members to unknowingly forego their rights and bind themselves to a process about which they have little truthful information and will leave un-remedied such unknowing waivers which have already occurred. Such a result would be wholly inconsistent with the policies underlying Rule 23. Plaintiffs

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[6] Arguably, as Putative Class Members' decisions to sign the Claim Form were induced by misrepresentation, the agreements are void and there is no need for rescission. *See* 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 299 (and cases cited therein). However, it is most appropriate in the class context to give each Putative Class Member an explicit choice whether to reform, rescind, or maintain the agreement they have entered into.

respectfully request the Court's intervention to both prevent and cure these serious abuses.

2. Abuse Caused By Coercive Conduct Of Defendants And Their Agents And Prevention And Remedy Thereof

By excluding Lead Plaintiffs from participation in the Claims Process and communicating that result to other Putative Class Members, Defendants seek to coerce Putative Class Members, including Lead Plaintiffs, into foregoing pursuit of class action litigation in favor of the Claims Process as well as disrupt the relationship between Lead Plaintiffs and their respective counsel. This has already caused, and threatens to cause further, very significant damage to the class action process.

In *Hampton Hardware*, the court stated unequivocally that "attempting to reduce the class members participation in the lawsuit based on threats to their pocket book" is coercive and runs "directly against the principle" animating Rule 23, namely "'a policy in favor of having litigation in which common interests, or common questions of law of fact prevail disposed of where feasible in a single lawsuit'." 156 F.R.D. at 633 (quoting *Gulf Oil*, 452 U.S. at 99 n. 11); *accord In re Sch. Asbestos Litig.*, 842 F.2d at 682. By denying payment of interim damages to those who are named in class action lawsuits against Defendants, Defendants are attempting to achieve just this result. The disparate treatment serves "no legitimate purpose," but rather seems aimed only at sending a message: (1) to other Putative Class Members that if they choose the join the class action, they too will suffer; and (2) to the Lead Plaintiffs themselves that they would be better off if they abandoned the lawsuit. *Hampton Hardware*, 156 F.R.D. at 634.

The danger of Defendant's succeeding in this coercive strategy is increased by the close-knit quality of the local fishing community that make up the Putative Class. *See* Fitz Dec., ¶ 8. It is well recognized that the coercive quality of a particular communication is often in part the product of the context in which it is delivered. *See,*

e.g. Kleiner, 751 F.2d at1202, 1206-07; *Wang*, 126 F.R.D. at 488-89. *In re Currency Conversion Fee Antitrust Litigation*, 361 F.Supp.2d at 253 (collecting cases); *Hampton Hardware*, 156 F.R.D. at 633. Here, the close-knit quality of the local fishermen who make up the putative class almost guarantees distribution of the information of the disparate treatment throughout the putative class's entirety. Indeed, the information that the *Tarantino* lead plaintiffs were not going to get any money from the Claims Process while other Putative Class Members would quickly circulated through the local fishing community. *See* Fitz Dec., ¶ 9. The coercive effect on Putative Class Members was quickly perceivable, it became common knowledge among the putative class that if you joined either class action Defendants and their agents would not talk to you and you would not get paid. *Id.*, ¶ 12. This not only caused other Putative Class members to forsake participation in the class action," but also made the Lead Plaintiffs reconsider their decision to have pursued class action litigation. Fitz Dec., ¶ 1;

This, in turn, has interfered with, and threatens to further interfere with, Lead Plaintiffs' relationship with their counsel and confidence therein. Lead Plaintiffs see all their friends getting paid and they get nothing because they are represented by counsel in a class action. This caused Lead Plaintiffs' confidence in their counsel to waiver, and threaten the relationship between them. *See* Fitz Dec., ¶ 11. It is clear from the words of Hudson Marine's claims adjuster to John Tarantino, *see* Tarantino Dec., ¶ 7, and counsel for Regal Stone Ltd. *et al.* to plaintiffs' counsel in the instant action, *see* Audet Dec., ¶ 4, that this is precisely the result Defendants seek.

Fortunately, the same close-knit quality of the putative class which has made the Defendants coercive tactics so effective also creates an opportunity for a remedy thereof. Specifically, Class Plaintiffs respectfully request that the Court order Defendants to open the Claims Process to ***all*** commercial fishermen with injuries flowing from the Oil Spill including Lead Plaintiffs. There is "no legitimate purpose" to excluding Lead Plaintiffs from the Claims Process and it serves only to punish the

Lead Plaintiffs for their choice to sue Defendants and coerce their choice of remedies and that of other Putative Class Members. *Hampton Hardware*, 156 F.R.D. at 634. It is only by ordering the Defendants to open up the Claims Process that the Court can inoculate the Putative Class from the effect of this coercion and thereby maintain the integrity of the class action process which the Defendants have attacked. *See, generally, Wang*, 236 F.R.D. at 489 (invalidating opt-outs gained through coercion); *In re Currency Conversion Fee Antitrust Litigation*, 361 F.Supp.2d at 254 (voiding certain arbitration agreements gained through coercion); *McKesson*, 126 F.Supp.2d at 1246.

D. Proposed Limitations And Remedies Will Not Significantly Limit Right of Defendants

As discussed in some detail *supra*, because the misleading and coercive communication by Defendants and their agents at issue here is commercial in nature, the first amendment concerns which animated *Gulf Oil* and its requirement that court-ordered limitations be narrowly tailored do not apply here. *See infra* pp 9-11. Rather any limits imposed by the Court must be "grounded in good cause and issued with a 'heightened sensitivity' for First Amendment concerns." *Hampton Hardware*, 156 F.R.D. at 633 (quoting *Kleiner*, 751 F.2d at 1203 n. 22). While the limitations and curative remedies which Class Plaintiffs respectfully request the Court impose easily meet this lesser standard, they also satisfy the more stringent standard.

First, Defendants can make no argument that an order requiring that Defendants and their agents cease making untruthful and misleading communications and take actions to cure those which they have already made infringes on their rights improperly. "As a threshold matter, untruthful or misleading speech has no claims on first amendment immunity." *Kleiner*, 751 F.2d at 1204 (citing *Central Hudson Gas Co. v. Public Serv. Comm.*, 447 U.S. 557, 566 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 771 (1976)). Basic tenants of fairness, not to mention the policies underlying Rule 23, demand that Defendants deal with Putative Class Members honestly and with adequate disclosures. *See supra*. There simply can

be no claim of right to mislead class members as to the consequences of participating in the Claims Process or seek to bind Putative Class Members to a process about which they are given no information.

Second, requiring that Defendants open up the claims process to all commercial fishermen affected by the Oil Spill actually furthers Defendants' legitimate interests in the efficient resolution of claims against them. If the Defendants goal in initiating the Claims Process is, as they have represented, to quickly get yearly 2007 damages "off the books," letting as many commercial fishermen as possible participate in Claims Process would actually conform with Defendants' interests. Fitz Dec., ¶ 13. Excluding the Lead Plaintiffs only serves the Defendants interest by sending a powerful message to the Lead Plaintiffs and other Putative Class Members that if they choose to pursue their common claims a single class through the courts, they will be punished. This runs directly contrary to the policies underlying Rule 23, and thus cannot be considered an interest or right about which the Court must be cognizant in crafting relief. *See Gulf Oil*, 452 U.S. at 99 n. 11.

V. CONCLUSION

Based on the foregoing, Class Plaintiffs respectfully request the Court:

1. Immediately enjoin the Claims Process and associated communications by Defendant or their agents, until a Revised Claim Form and Revised Cover Letter, as described below, is drafted and approved by the Court.

2. Order Defendants, in cooperation with Plaintiffs and subject to Court approval, to redraft, and submit for Court approval, a Revised Claim Form and Revised Cover Letter which Defendants and their agents will be required to exclusively use in communication with Putative Class Members that includes:

   (a) The following proposed language: "Acceptance of any payment is without prejudice to pursuit of any legal action in a court of law. Any payment through the Claims Process will be credited against any recovery by compromise, trial or other adjudication of past, present or future claims arising out of the incident of November 7, 2007."

   (b) A complete description of the Claims Process, including the identity of Hudson Marine and its employer, without conditions.

© Complete information regarding both class actions, including status of actions and contact information of counsel for plaintiffs in both class actions.

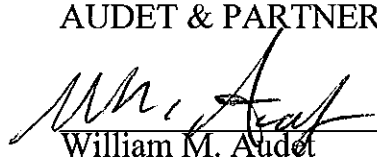
4. Order Defendants to distribute, in cooperation with Plaintiffs and subject to Court approval, a Curative Notice with the Revised Claim Form and Revised Cover Letter to every Putative Class Member who has already signed any claim form with Defendants, Hudson Marine, or *any* other agent of the defendant, which informs such members of their right to rescind their former agreement with Defendants, Hudson Marine, or any other agent of the Defendants and enter, if they choose, the agreement embodied in the Revised Claim Form.

5. Order Defendants to open the Claims Process to all commercial fishermen with claims arising out of the Oil Spill.

Class Plaintiffs respectfully submit that without these actions there is a strong likelihood that Defendants will frustrate the class action process and avoid their responsibility for the injuries they have caused members of the putative class, and they request the Court's assistance in preventing this from happening.

Dated: January 17, 2008

AUDET & PARTNERS, LLP



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